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Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1973.

No. 73-469

HARRIET SIGNER,

Petitioner,

v.

TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER 1973 TERM.

No. .

HARRIET SIGNER,
Petitioner-Appellant,

v.

TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION CO.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Harriet Signer respectfully prays for a writ of Certiorari to the United States Court of Appeals for The Third Circuit to review an order of that Court entered June 22, 1973 which affirmed the opinion and order No. 988 issued October 26, 1972 by the U. S. District for the Eastern District of Pennsylvania in charge of the reorganization proceedings of the Penn Central Transportation Co. Copies of both orders and opinions are hereto appended as (Appendix "A" and "B") and made part of this petition. These orders and opinions are unreported as of the date of this petition.

JURISDICTION.

The Jurisdiction of this Court is invoked on the grounds that petitioner's class action brought in the District Court below (Document 1975) and on the Appeal to the Court of Appeals for the Third Circuit, raises the grave and all important issue of respondents individually and as trustees of the debtor in reorganization, have collected and diverted rents and income generated from the non-rail, defaulted mortgaged properties of the value in excess of 100 million dollars, the property of petitioner and thousands of bondholders and continue such taking of property without due process of law, in clear violation of the Fifth Amendment to the United States Constitution which provides that "no person shall be deprived of life, liberty or property, without due process of law; nor shall property be taken for public use without just compensation."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the District Court and the Court of Appeals below erred in their decisions of the respective orders and opinions (Appendix "A" and "B") by allowing the dismissal of petitioner's class action (Document 1975) on motion of the respondents, before their answer was interposed, without a hearing on the merits, in violation of the "Due Process of Law" provision of the Fifth Amendment to the Constitution of the United States.

2. Whether the Court of Appeals below erred in its Judgment Order (Appendix "B") affirming the order and judgment of the District Court (Appendix "A"), on the basis of its unrelated and inapplicable decision, "In re Penn Central Transportation Co. (Sales of Park Avenue Properties) Nos. 72-2116-72-2126, (3rd Circuit filed June 14, 1973).

3. Whether the Court of Appeals below erred in its decision and order (Appendix "B") under which it entirely overlooked, failed to speak on, or make reference to the vital and most important issue, of "Depriving the Petitioner and thousands of other bondholders of their property in violation of the Fifth Amendment to the United States Constitution," which was directly and specifically presented on the Appeal.

STATEMENT OF THE CASE.

On June 21, 1970, Penn Central Transportation Company, as debtor, filed a Petition for Reorganization of a Railroad under Section 77 of the Bankruptcy Act, in the United States District Court for the Eastern District of Pennsylvania. The petition was approved by the Court on the same day.

Petitioner-Appellant is the owner of $45,000 face amount and represents seven other owners holding $700,000 of Series A & C Refunding & Improvement Coupon bonds secured by a duly recorded mortgage dated October 1, 1913, issued by New York Central-Hudson River Railroad Co., debtors predecessor. As security for the payment of principal and interest on these bonds, the Mortgagor has granted, conveyed and assigned to the bondholders' Trustee, in addition to certain Railroad lines, all the non-operating real estate, together with all the rents, income and earnings derived therefrom, located in New York and several other states.

Default on the mortgage occurred on October 1, 1970 when the semi-annual interest on the bonds was not paid.

The documentary evidence on file in the District Court discloses that for a period of more than one year, Petitioner-Appellant and her attorney, on several occasions, made written and oral demands upon Morgan Guaranty Trust Co. (Morgan), the Trustee for the bondholders named in the mortgage, to take all necessary legal action or otherwise to protect the interest of the bondholders. Petitioner's class action was filed in the District Court below on October 14, 1971 (Appendix Document 1975 P. 5a) after the receipt of the letter from Morgan's attorneys (Appendix Document 3019 Page 59a) in which Petitioner's attorney was encouraged "to pursue vigorously his efforts to assist in protecting the rights of the bondholders."

On November 9, 1971 respondents moved to dismiss the class action (Appendix Document 2149) without interposing an answer to the 15 allegations contained in the complaint. The motion was based upon three untenable grounds: (1) No allegation in the Petition of Compliance with Section 77(p) of the Bankruptcy Act. (2) Petitioner has no standing since a claim on her behalf was made by an indenture trustee pursuant to Section 77(c)(7) of the Bankruptcy Act. (3) Petitioner is precluded by the provisions of the mortgage referred to in the petition from obtaining the relief sought. The motion having been presented to the District Court with a supporting affidavit (Appendix Document 2237) with selective provisions of the mortgage involved and several letters for the purpose of negating some of the allegations of the complaint, must be treated under the established rules of legal procedure as a motion for summary judgment.

Petitioner's answer to the motion to dismiss (Appendix Document 2884, page 47a) and the supporting affidavit of counsel for the Petitioner (Document 2884, page 50a) together with the other pertinent documents on file in the District Court, have definitely established factually and legally that there is no validity whatsoever to the three grounds urged by the respondents on their motion to dismiss.

The most amazing feature of this entire proceeding is that Morgan Guaranty, the trustee for the bondholders under the mortgage involved herein on May 26, 1971, filed its Petition in the District Court (Document 1297) in which it seeks the authority of the Court "to resign as trustee under certain or all of the indentures"—"by reason of conflicts of interest." and in the alternative sought instructions from the Court "as to what steps it should properly take in order to resolve the conflicts of interest among the indentures referred to above."

This petition further states, that Morgan is a participant to the extent of $25,000,000 in a $300,000,000 bank loan to the debtor which is secured by a pledge of the debtor's stock in Pennsylvania Co. and is in default.

In paragraph 10, page 5 of its petition (Document 1297) the trustee for the bondholders in question states . . . (quote) "To the extent that Morgan Guaranty in its individual capacity as a secured creditor, seeks to collect or to realize upon such claim, its interest as such claimant may conflict with the interests of each of the various classes of bondholders for whom Morgan Guaranty acts as a fiduciary."

As relates to appellant's cause of action, the Morgan petition to the court alleges (Document 1297, Par. 9, Page 4).

"Inevitably, similar conflict of interest problems will arise (i) when segregation studies are conducted and (ii) when plans of reorganization are promulgated. Conflicts of interest can be avoided only by an independent spokesman. Morgan Guaranty believes that provision for such independent representation should be made promptly in order to provide adequate opportunity for such representatives to become familiar with the respective indentures and to prepare to render the services they will be called upon to perform in the future."

There are other glaring conflicts of interest stated in the petition in addition to those quoted here, which clearly disqualified Morgan from acting as a fiduciary trustee for the bondholders, at the time appellant's class action was instituted. In fact, appellant's action served to relieve the bondholders' trustee from its fiduciary responsibility it had as it represented to the District Court.

It is to be noted that the contents of Morgan's petition to the District Court (Document 1297) are extremely mate-

rial to the issues presented on the motion to dismiss appellant's action (Document 2149). Neither the appellant or her attorneys had knowledge of the existence of this document until after all the motion papers were completely served and filed. On the other hand, Morgan, the petitioner in Document 2149, and the debtor's trustees, the moving parties, were totally silent in this regard. They failed to call the court's attention in any of the papers submitted in support of the motion to dismiss, the relevant and most material contents of such important document in the entire proceeding.

The foregoing papers completely invalidate grounds (2) and (3) urged by the respondents on their motion. The remaining ground (1) is based on the absence in petitioner's complaint of an allegation of compliance with Section 77(p) of the Bankruptcy Act, which involves the solicitation of proxies or authorizations to represent creditors or shareholders in a proceeding under the act. It clearly appears that this ground is without merit and inapplicable to this proceedings for the reason that petitioner's action was instituted as a matter of right, without any solicitation of proxies or authorizations from anyone being involved.

The only other ground relied upon by the District Court to dismiss the action is "For the reasons set forth in opinion and order No. 974, an order will be entered denying the petition for sequestration." (Appendix Document 4560 page 121a).

This refers to another and separate proceeding instituted by a combination of three banks including Morgan in the District Court below on February 23, 1972 (Document 2672) more than four months after Petitioner filed her class action and before a decision was made on the motion to dismiss. This proceeding involves a number of

unrelated Mortgages except that Morgan appears therein as trustee for the R&I mortgage (Document 2672 Par. 3) which is the same mortgage involved in petitioner's class action.

The appellant here was not a party to that proceeding nor received any notice relating thereto.

Moreover when the petition of three banks was filed to sequester rents generated from different mortgaged properties, until the final order was entered therein (Document 4528, Page 107a), Morgan, by its own filed documents in the District Court, was completely disqualified to act as trustee for the bondholders under the mortgage involved here. In addition there is asserted in the petition of the three banks, a specific conflict of interest by Morgan as Trustee, as to superiority of rights relating to the Harlem Mortgages (Document 2672, pages 17-19).

Furthermore the petition of the three bank trustees, for sequestration of rents (Document 2672) failed to assert the vital and important issues of "Depriving the bondholders of their property in violation of the Fifth Amendment to the Constitution," and the impairment of the bondholder's substantive rights by respondents' failure to pay the taxes on the no-rail mortgaged properties, thereby creating a superior lien. These issues were specifically asserted and raised in petitioner's class action (Document 1975 Paragraphs 12 and 15). In view of the above mentioned facts and documents, the District Court erred when it dismissed the Appellant's class action based on its opinion and order 974.

On the Appeal to the Third Circuit Court of Appeals, the opinion and order of the District Court was affirmed without comment or reference to the important and substantial constitutional issues specifically presented on the Appeal. The affirmance is based on the decision of the same

Circuit Court, "In re Penn Central Transportation (Sale of Park Avenue Properties), Nos. 72-2116-72-2126 (3rd Cir., filed June 14, 1973) unreported at this time. This decision only involved the sale of six non-rail properties for a total of 59 million dollars (Appendix Exhibit "B"), and is entirely not applicable to the substantial and constitutional issues presented on the Appeal. Therefore the court below was in error when it affirmed the opinion and order of the District Court (Appendix Exhibit "B").

REASONS FOR GRANTING THE WRIT.

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(1) Petitioner Appellant's Class Action in the District Court and in the Appeals Court Below, Specifically and Directly Raised the Fundamental and Important Constitutional Issue of the "Taking the Property of the Bondholders in Question of the Value in Excess of 100 Million Dollars (Up to May 1972) by the Respondents, During the Pendency of the Reorganization Proceedings and Their Continuing This Practice," Contrary to the Applicable Decisions of the Supreme Court and in Clear Violation of the Provision of the Fifth Amendment to the Constitution of the United States.

The facts and circumstances related to this important issue are supported by the documents and papers presented to the Courts below. The District Court in its opinion and order No. 988 and the Appeals Court Judgment and Order of Affirmance (dated June 22, 1973) do not contain any reference, comment or statement relating to this vital issue. It has been entirely avoided by the Courts below.

The Supreme Court in the applicable case of *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. at Page 602, laid down the rule of law in clear language.

> "For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that through taxation, the burden of the

relief afforded in the public interest may be borne by the public."

The principle of law above quoted was followed by this Court in *Wright v. Mountain Trust Bank*, 300 U. S. 400-470 where the new amended Frazier-Lemke Act was held valid because it was free from the objectionable features which had been held fatal and unconstitutional to the original act.

In the leading case of *Continental Illinois National Bank v. Chicago, Rock Island & P. Ry. Co.*, 294 U. S. 648 on the subject of railroad reorganization proceedings under Section 77 of the Bankruptcy Act, the issue involved a stay of action for a reasonable time by a secured creditor from enforcing his rights of sale of the security held. The stay was granted in order to afford the debtor a reasonable time to submit a plan of reorganization. However, the Court held that neither Congress nor the Courts have power under the Bankruptcy Act to modify or impair the interest of secured creditors in mortgaged property.

All the Federal District and Circuit Courts of Appeals have uniformly held that Congress and the Courts have no authority to take or confiscate a property right belonging to a secured creditor without violating the Fifth Amendment.

Bindeil v. Liberty Trust Co., 248 F. 112-114 (3d Cir. 1917); *Associated Co. v. Greenhut*, 66 F. 2d 428-429 (3d Cir. 1933); *In re Franklin Garden Apartments*, 124 F. 2d 451-454 (2d Cir. 1941); *Reconstruction Finance Corp. v. Kaplan*, 185 F. 2d 791-796 (1st Cir. 1950); *In re Third Ave. Transit Corp.*, 198 F. 2d 703, 707 (2d Cir. 1952).

The opinion and order of the District Court which denies appellants the right to sequester the rents is con-

trary to its own decision in Order No. 15 (Document No. 110) in the same proceeding. In this matter the District Court directed that rentals derived by the debtor from certain non-rail properties be placed in escrow on the basis of the claim of an assignment of these rentals held by the noteholders, of the Pennsylvania Tunnel and Terminal RR Co. ("PTT"). The rights of the "P. T. T." noteholders to the rentals, are based on an assignment of these rentals as security for the payment of $50 million secured notes issued by P. T. T., a subsidiary of the debtor. This assignment is identical with the same legal effect as the assignment of the rents to the bondholders trustee provided in the mortgage involved here. The District Court having granted escrow of rentals to the P. T. T. noteholders, it was error and contrary to every principle of equity to deny the same relief requested in Petitioner's class action.

(2) The Orders of the Courts Below (Appendix "A" and "B") Are Repugnant to the Due Process Clause of the Fifth Amendment to the Constitution.

Petitioner's class action was filed in the District Court on October 14, 1971 (Appendix 1975 Page 5a) on behalf of herself and thousands of bondholders similarly situated, after demands were made upon the Trustee of the Bondholders for a period of more than a year to take such action. The record in the District Court discloses that the documents filed and by its own admission in writing, the bondholders' Trustee was entirely disqualified to act in the matter. Under these circumstances Petitioner's class action was most appropriate as she had the legal right to maintain and prosecute same.

In cases where much less conflict of interest existed by a Trustee as here, bondholders were allowed to act.

Farmer's Loan & Trust Co. v. Northern Pack. Co., 66 Fed. 169 (1895); *Rabinowitz v. Kaiser Frazer Corp.*, 111 N. Y. S. 2d 539 (1952); *Campbell v. Hudson & Manhattan R. R. Co.*, 102 N. Y. S. 2d 878 (1951); *Borg v. New York Majestic Corp.*, 139 N. Y. S. 2d 72 (1954).

The Appellant having fully established by the records on file in the District Court that she had a legal right to maintain her action, the courts below, by their orders of dismissal and affirmance, deprived the bondholders of their right to the due process clause of the Fifth Amendment to the Constitution.

The leading case decided by this Court on this subject is *Schechter v. U. S. of America*, 295 U. S. 495 (Hughes & Cardozo, J. J.) where this Court held that "Extraordinary conditions do not create or enlarge constitutional power and cannot justify governmental action outside of constitutional authority" and is therefore repugnant to the *due process clause* of the Fifth Amendment.

(3) This Reorganization Proceeding Effecting the Largest Railroad in the Country and the Unusual Number of Other Rail Lines Now Involved in Similar Proceedings Concerns an Important Economic Situation Affecting the Entire Nation.

Congress, the Courts and all the Federal supervisory agencies are overtaxed with the difficult problems presented, in efforts to find a solution. Billions of taxpayers and secured and general creditors funds are expended for the purpose of keeping these railroads alive and in operation. However with the advent of the automobile and airplane, the railroads with few exceptions, have become obsolete.

In view of the national interest, it is respectfully submitted that this Court should have an opportunity to review the orders in question in order to determine whether

the extraordinary conditions existing with relation to the railroads justify the taking and diverting of the property of thousands of bondholders of the value in excess of 150 million dollars at this date.

For the foregoing reasons it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

MAX ROTHENBERG,
Attorney for Petitioner.

August 20, 1973

APPENDIX "A".

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD
BKY. No. 70-347

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor

Opinion and Order No. 988.

[Re: Petition of Harriet Signer]

FULLAM, *J.* October 26, 1972

Two related petitions by one Harriet Signer, a holder of bonds issued by the Debtor, secured by the R&I mortgage, evidence a certain amount of confusion as to the applicability of the Federal Rules of Civil Procedure to a railroad reorganization proceeding under § 77 of the Bankruptcy Act.

The first petition (Document No. 1975) seeks an order for the sequestration of certain rents, in order to pay mortgage bond interest, real estate taxes and other charges. This petition purports to be a class action under Rule 23 of the Rules of Civil Procedure, and alleges that it is brought by the petitioner

> ". . . on her own behalf and on behalf of all other holders of Series A and Series C debentures . . . simi-

larly situated. The holders of the aforesaid debentures, on information and belief, number some thousands and it is, therefore, impractical to bring all of them before the court. The questions of law and fact involved herein are common to the entire class, the claim of petitioner is typical of the claims of the entire class, and petitioner will fairly and adequately protect the interest of the entire class of persons holding the aforesaid debentures." (Petition, paragraph 3.)

The petition contains further allegations to the effect that petitioner requested the Morgan Guaranty Trust Company, indenture trustee of the R&I mortgage, to bring legal action to obtain sequestration of the rents, but that the indenture trustee had failed and refused so to act.

Thereafter, petitioner filed a motion seeking to compel the joinder of Morgan Guaranty "as an involuntary party plaintiff" (Document No. 2548), apparently seeking to compel Morgan Guaranty to join in the earlier petition, which the petitioner persisted in treating as if it were a separate plenary suit.

The merits of both of these petitions has effectively been decided. Morgan Guaranty later filed its own petition for sequestration of rents, hearings were held at which both Morgan Guaranty and Harriet Signer appeared through counsel and presented their views, and, as set forth in Opinion and Order No. 974, sequestration of rents has been denied. However, it remains for the Court to enter an order formally disposing of the separate Signer petition, which, in a supplemental memorandum filed October 16, 1972, is referred to as if it were a class action on behalf of a limited class of eight bondholders (not otherwise identified), and, perhaps, as some sort of an application for some kind of intervention.

It is apparent that, on the present record, both of the Signer petitions must be regarded as having been filed on behalf of the petitioner as an individual, and not otherwise. Rule 81(a)(1) of the Federal Rules of Civil Procedure provides that the Federal Rules are not applicable to bankruptcy proceedings except as specifically ordered by the Supreme Court. General Order No. 49(2) of the General Orders in Bankruptcy provides that the General Orders in Bankruptcy apply to railroad reorganization proceedings "in so far as they are not inconsistent with § 77" (with certain exceptions not presently pertinent). General Order No. 37 provides:

> "In proceedings under the Act, the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the Court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

It is unnecessary to decide the broad question of whether Fed. R. Civ. Proc. 23, governing class actions, has any application at all to railroad reorganization proceedings. Since § 77(p) of the Bankruptcy Act contains lengthy and detailed provisions governing the extent to which one person may act on behalf of others in reorganization proceedings (generally, not without the express approval and authorization of the Interstate Commerce Commission, except in the case of unsolicited groups not more than 25 in number), and since it is clear that these provisions are squarely inconsistent with this petitioner's original attempt to act on behalf of a class consisting of thousands of bondholders, the conclusion is inescapable that, at the very least,

Rule 23 cannot be applied in this reorganization proceeding to the extent originally sought by the petitioner

There has been no formal amendment of the Signer petition. Nevertheless, statements made at oral argument, and in the supplemental memorandum recently filed, suggest that the petitioner now seeks to act on behalf of a group of only eight bondholders. Rule 23 cannot be applied to justify this approach either, since the "class" is not identified, is not shown to have common interests which would set this group apart from the other thousands of bondholders, and, in any event, is not so numerous that joinder would be impracticable. Moreover, it would seem that the indenture trustee is the appropriate representative.

For all of these reasons, Rule 23 may be disregarded. What remains, then, is a petition by a single bondholder owning some $45,000 worth of bonds (or, perhaps, a petition, within the limitations set forth in § 77(p) of the Bankruptcy Act, on behalf of a group of eight bondholders with combined holdings of $740,000), out of a total issue in excess of $250 million. It is clear that the petitioner, whether acting for herself or for the group of eight bondholders, lacks standing to require general intervention.

Whether the petitioner had a right to be heard is now moot, since she was in fact accorded that right. For the reasons set forth in Opinion and Order No. 974, an order will be entered denying the petition for sequestration. The petition for compulsory joinder of Morgan Guaranty will be dismissed as moot. And, for the reasons set forth above, petitioner's informal request for leave to intervene in these proceedings will be denied.

ORDER No. 988.

AND NOW, this 26th day of October, 1972, it is ORDERED:

1. That, for the reasons set forth in Opinion and Order No. 974, the petition of Harriet Signer for sequestration of rents (Document No. 1975) is DENIED.

2. That the petition of Harriet Signer for compulsory joinder of Morgan Guaranty Trust Company as a "party plaintiff" (Document No. 2548) is dismissed as moot.

3. That the application of Harriet R. Signer for leave to intervene generally in these proceedings is hereby DENIED.

JOHN P. FULLAM, *J.*

APPENDIX "B".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-2127.

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
Debtor,

HARRIET SIGNER,
Appellant.

APPEAL FROM ORDER NO. 988 OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
Monday, June 18, 1973.

Before: ADAMS, GIBBONS and WEIS, JR., *Circuit Judges.*

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Judgment Order.

After considering appellant Signer's contentions that the district court erred in denying appellant's motion to intervene or to proceed as a representative of a class in litigation seeking the sequestration of certain rents and income received from non-operating properties by the Trustees of the Penn Central, and in view of the fact that this Court has determined that sequestration of said rents and income is not required, *In the Matter of Penn Central Transportation Company* (Sale of Park Avenue Properties), Nos. 72-2116-72-2126 (3d Cir., filed June 14, 1973) at 25, it is hereby

ORDERED AND ADJUDGED that the judgment of the district court is affirmed. Costs taxed against appellant.

By the Court,

ARLIN M. ADAMS,
Circuit Judge.

Attest:

THOMAS F. QUINN,
Clerk.

Dated: June 22, 1973.